

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

77-6124
77-

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOEL HARNETT, et al.,

Plaintiffs-Appellees,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellant,

and

EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES,

Defendant.

Appeal from the United States District Court
for the Southern District of New York

IN RE SECURITIES AND EXCHANGE COMMISSION, PETITIONER

Petition of the Securities and Exchange Commission
for Writs of Mandamus and Prohibition to the Honor-
able Vincent L. Broderick, United States District
Judge, United States District Court for the Southern
District of New York

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JOEL HARNETT, et al.,

Plaintiffs,

-against-

SECURITIES AND EXCHANGE COMMISSION,
et al.,

Defendants.
-----X

77 Civ. 3110 (VLB)

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS BY DEFENDANT
EXECUTIVE OFFICE OF THE PRESIDENT

Preliminary Statement

Defendant Executive Office of the President submits this Memorandum of Law in support of its motion to dismiss the complaint as against it for failure to state a claim upon which relief may be granted.

STATEMENT OF FACTS

Plaintiffs have brought this action under the Freedom of Information Act, 5 U.S.C. § 552, to compel the disclosure of a report on New York City finances that is being prepared by the Securities and Exchange Commission ("SEC"), together with the documentation relied upon by the SEC in its preparation. The Executive Office of the President has been named as a defendant in the suit solely because on May 5, 1977

plaintiff Joel Harnett addressed a mailgram to the President of the United States requesting that he

"direct the Chairman of the Securities & Exchange Commission to order the completion and release of the report no later than June 1, 1977." (Exhibit A to the Complaint.)

That mailgram was routinely referred by the Office of the White House to the SEC. (See Exhibit B to the Complaint.)

Plaintiffs acknowledge that the purported report they seek is an SEC record (Complaint ¶ Ninth-Fifteenth), and they do not allege that the Executive Office of the President actually has the report or any of the underlying documentation.

ARGUMENT

THE COMPLAINT FAILS TO STATE
A CLAIM AGAINST THE EXECUTIVE
OFFICE OF THE PRESIDENT UPON
WHICH RELIEF MAY BE GRANTED

The Freedom of Information Act ("The Act"), 5 U.S.C. § 552, was enacted to "assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests." Vaughn v. Rosen, 523 F. 2d 1136, 1143 (D.C. Cir. 1975). In pursuit of this objective, the Act requires that, upon request by a member of the public and within the limitations established by the statutory exemptions for sensitive information, the agency "shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3). If the agency fails to provide access to its documents, the district courts are

authorized "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

Thus the only relief available under the Act is an order requiring the particular agency to provide access to its records. No authority is vested in the Court to require an agency to draft a document that does not exist, see, e.g., American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 704 (D.C. Cir. 1969), and "[t]he Act does not grant the courts general supervisory power to control the performance of executive agencies." Church of Scientology v. United States Department of Justice, 410 F.Supp. 1297, 1301 (C.D. Cal. 1976).

Since the Court is limited to directing an agency to produce its documents, necessarily litigation under the Act is limited to suits brought against the agency whose records are sought. See, e.g., Skolnick v. Campbell, 454 F.2d 531, 533 n. 2 (7th Cir. 1971).

In this case, the plaintiffs are seeking a report that is apparently still being prepared by the SEC. No records are sought from the Executive Office of the President, as is demonstrated by plaintiff Harnett's mailgram to the President. All he seeks is a direction by the President to the SEC to complete and release its report by a date certain.

Such a demand does not constitute a Freedom of Information Act request to an agency, and in any event the Court has no authority to direct the President or the Executive Office of the President to comply with Mr. Harnett's demand. To hold otherwise would in effect impose an additional level of administrative appellate review upon those already provided for under the Act and administrative regulations, since the President or the Executive Office would have to review all agency Freedom of Information Act determinations or else risk being named in every suit brought under the Act. Moreover, such a holding would fly in the face of the procedural requirements established by the Act, under which requests are addressed to the agency from which records are sought and suit is brought against the same agency, which may then litigate its claims of exemption. Finally, to permit plaintiff's mailgram to invoke the jurisdiction of the Court would place the judiciary in the position of overseeing the production as well as the release of government records, a result clearly inconsistent with the provisions and purpose of the Act.*

* It should also be noted that Mr. Harnett's request was to the President, not the Executive Office of the President, and that the President and his advisors are not subject to the Act. See Nixon v. Sampson, 389 F.Supp. 107, 145-47 (D.D.C. 1975), stay granted on other gds., 513 F.2d 427 & 430 (D.C. Cir. 1975).

CONCLUSION

Based upon the foregoing, it is apparent that no cognizable claim is or can be asserted in this case against the Executive Office of the President under the Freedom of Information Act. This Court should therefore dismiss the Complaint against the Executive Office.

Dated: New York, New York

August 2, 1977

Respectfully submitted,

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Of Counsel.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, SAVE OUR CITY, INC.,
and GORDON MARSHALL,

Plaintiffs,

vs.

SECURITIES AND EXCHANGE COMMISSION,
EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

Defendants.

77 Civ. # 3110

Before:

HON. VINCENT L. BRODERICK,

District Judge.

New York, August 4, 1977;
10.15 o'clock a.m.
(Room 654)

APPEARANCES:

GORDON MARSHALL, ESQ.,

Attorney for Plaintiffs.

MARVIN JACOB, Esq., and
SAMUEL FRIEGER, Esq.,

Attorneys for Defendant SEC.

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MR. JACOB: Shall I begin, your Honor?

THE COURT: Yes.

MR. JACOB: Your Honor entered an order, I believe, on August 2 staying the production of certain materials for in camera inspection to 5 p.m. on Friday, August 5, 1977. It is with respect to that that I appear here this morning, and I should preliminarily say Mr. Marshall and I had two discussions on the phone last night, the last one at about 11 p.m., in an attempt to resolve this matter without coming to court. That being the case, we are here.

The morning after the entry of that order on August 3, 1977 we filed a notice of appeal with the District Court and in view of the need for expedition we inquired or we advised the District Court Clerk of the need for expedition, and he told us that we should promptly take our notice of appeal, a copy of it, and go up to the Court of Appeals Motion Clerk. We did that and we were advised by the Clerk that no panel of the Court of Appeals would be available before August 15, and that the next motion day pursuant to Rule 27-B, I believe, of the local appellate rules would be the following day, August 16, 1977.

The Clerk advised us that the Court of Appeals

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2 favors responsive pleadings, answering papers, that
3 appeals be handled in the normal course, and that it was
4 the standing policy pursuant to Rule 8 of the Federal Rules
5 of Appellate Procedure for the Court to ask all parties
6 under these circumstances to return to the District Court
7 and request the necessary stay so that the Court of Appeals
8 can act in the normal course.

9 He emphasized, however, that whether or not
10 the stay is granted is within the discretion of the District
11 Judge, of course. In the event that the District Judge
12 does not grant the stay it will be up to the single judge
13 in the Court of Appeals to decide what to do.

14 I would like to note that Rule 8 of the Federal
15 Rules of Appellate Procedure provides that a motion for a
16 stay pending an appeal should normally be handled by a
17 panel or division of the Court of Appeals and that only
18 in exceptional cases, where it is impracticable due to time
19 requirements should the single judge be resorted to.

20 We therefore are here this morning to advise
21 your Honor of that and wish to emphasize that insofar as
22 the preparation of papers are concerned, the work that goes
23 into preparing a statement, we gain nothing by this because
24 if the matter is calendared for the motion day in the
25 Court of Appeals on August 16, under 27-B of the local

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2 rules we must serve Mr. Marshall with papers today.

3 In any event, we are not here, in other words, attempting
4 to gain time in terms of preparing statements, whether we
5 go before a single judge today or tomorrow or we go before
6 the motion part of the Court of Appeals on August 16,
7 and, as I have indicated, Mr. Marshall must be served
8 today in order to get on that calendar.

9 In my discussion, as I stated it to Mr. Marshall
10 yesterday, I told him that we were not going to gain any-
11 thing insofar as that was concerned but that on the contrary,
12 since he was going to be served today and probably quite
13 late today, he would not have the ability to file a
14 responsive pleading, a measured response to our papers if
15 we were constrained to go before a single judge.

16 Let me dwell a moment on what the Clerk told
17 us up in the Court of Appeals, which is really what is
18 evident from the policy expressed in the policy rules and
19 which in the normal course ought to be followed:

20 That the Court of Appeals ought to have before
21 it responsive pleadings, pleadings of the parties, an
22 adequate record, and unless the time requirements are of
23 such a kind that make it impracticable that business be
24 handled in the normal course, then the single judge should
25 be applied to.

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2 Now, the Commission has been before your
3 Honor with Mr. Marshall on three hearings, I believe,
4 argument that I suppose stand seven hours or more. There
5 has been extensive pleadings and briefs put before your
6 Honor. We believe that questions of first impression
7 have been raised here, and as I have told Mr. Marshall,
8 I just think that to have this matter placed before a
9 single judge of the Court of Appeals today for the benefit
10 of possibly a record without the benefit of Mr. Marshall's
11 responsive pleadings and so much time has been expended
12 on these issues before the District Court that it would
13 really have to be shown that the time requirements make it
14 impracticable to do it any other way.

15 I suggest, your Honor, at the very latest we
16 are going to be in the Court of Appeals on the 16th of
17 August and the Court of Appeals will either stay or not
18 stay your Honor's order. Between then and the date
19 which Mr. Marshall's client is vitally interested in,
20 September 8th, there is more than three weeks, approx-
21 imately three and a half weeks. If Mr. Marshall is
22 able to convince the Court of Appeals that the Commission's
23 positions are without merit, an order can be made in
24 sufficient time to see to it that the interests Mr. Marshall
25 serves are implemented and carried out.

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I just do not believe, your Honor, that with more than three weeks after the 16th, the ability of a Court of Appeals to make an appropriate order at that time, this is the kind of case that this Court ought to place today before a single judge of the Court of Appeals. I just think that this can be handled in the normal course, and your Honor has always had a commitment that we are continuing to move forward in terms of the preparation of a report as expeditiously as is humanly possible.

I just stated that Mr. Marshall and I were on the phone last night as late as 11 o'clock. My secretary answered the phone in the Commission's offices. We are really working hard.

I would urge the Court to enter an order further staying the order of this Court or August 2 for an additional number of days past the 5th of August on the basis that there is just not a panel of the Court of Appeals available. If this were January or February we would be there, but this is August. The panel is unavailable till the 15th, and that being the case, and the next motion day being the 16th, in view of the complexity and novelty of the issues raised in this case, the extensive hearings that have been held and the briefs that have been filed, as your Honor has had an opportunity to

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2 review, that it would appear to be consistent with policy
3 of the Federal Rules to further stay that order, particu-
4 larly because I see no real damage, no discernible damage
5 to the plaintiff's position. The 16th is a date on
6 which the Court of Appeals sits and considers these
7 matters. It will have the record. It will have briefs.

8 Mr. Marshall will have one week to file a
9 responsive pleading. He will have no opportunity to do
10 that now. That is what those rules are there for.
11 They say exceptional cases, practicable from time require-
12 ments. I suppose that is the policy of the rule. That
13 is what it meant to do. The judge is there for, I
14 suppose, emergencies, but not in the case where there are
15 three weeks after the 16th and the ability of the Court
16 of Appeals to see the way, by any appropriate order that
17 you make, that the plaintiffs' interests are served,
18 if they are entitled to be served.

19 THE COURT: Before I hear Mr. Marshall, let me
20 ask you this, and it is a question I should have raised at
21 the last hearing:

22 How is this order appealable?

23 MR. JACOB: Your Honor, our papers will cover
24 that. We do believe that it is and as Mr. Pitt stated
25 during oral argument, in order to invoke all of our rights,

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2 not waive any, that is, we are going by mandamus as
3 well. But Mr. Marshall has discussed this with me as
4 well. I think that was the statement of Mr. Pitt.
5 I don't really want to elaborate upon it now. He is
6 going to be filing papers. I wish I could be more
7 helpful at this time.

8 THE COURT: I will hear from you, Mr. Marshall.

9 MR. MARSHALL: Your Honor, Mr. Jacob and I
10 go back a long way and his tone is reasonable but I think
11 what he asks is completely unresponsive. I was sitting
12 here trying not to interrupt and I did not interrupt his
13 presentation, but mentally I'm tearing my hair out.
14 For you to grant his request would, in effect, deny the
15 plaintiffs the relief they seek in the action, much less
16 the relief they seek on the order to show cause, which
17 order to show cause, I might note, have not been finally
18 disposed of.

19 In the course of considering whether you are
20 going to grant or deny our order to show cause you have
21 made an interim order directing that papers be delivered
22 to you in camera in order for you to make a decision on
23 the motion in main. I have checked the law and I
24 disagree with Mr. Jacob. I don't feel that your Honor
25 is appealable at all. I don't think there is anything

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2 to appeal at this stage, No. 1.

3 "No. 2, he is asking us to really put the brakes
4 on this case until the 16th of August. A critical date
5 from my client's point of view is September 8.

6 Excuse me a minute. We had a discussion
7 last night. I don't know whether it was on or off the
8 record. I want to ask Mr. Jacob.

9 (Pause.)

10 MR. MARSHALL: I asked Mr. Jacob last night
11 whether he would waive the Commission's right to go to the
12 Supreme Court of the United States on an expedited basis
13 or on any basis and be content with what the Court of
14 Appeals would decide, and we have no way of knowing how
15 quickly the Court of Appeals would act. He said he
16 couldn't make that sort of commitment. We did try
17 ways and means to cooperate with the SEC, but they always
18 respond in terms that they are doing their best and they
19 would check with you. You can't get any reason commit-
20 ment from them.

21 But even more important -- I don't know who
22 the Clerk is Mr. Jacobs said he spoke with, but I went
23 up there this morning and spoke with Mr. Arthur Heller,
24 who told me -- the Clerk of the Court is Mr. Fusaro, but
25 I spoke with Mr. Heller who said he spoke with an SEC

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2 attorney. He didn't identify Mr. Jacob by name.
3 I repeated to him in essence what Mr. Jacob has mentioned
4 to your Honor this morning with respect to Mr. Heller's
5 version of the attitude of the Court of Appeals and Mr.
6 Heller said, "Not so, he must have misunderstood," and
7 I discussed Rule 21, which is the mandamus, and Rule 8,
8 which is the appeal's situation, and I got a different
9 impression. I think the impression that Mr. Jacob is
10 conveying to the Court is that the Court of Appeals would
11 frown upon an application of a single judge or that it
12 would be unfair to request a single judge --

13 THE COURT: I didn't interpret that from what
14 Mr. Jacob was saying. I thought that he was saying that
15 this is a matter of such moment it should be considered
16 by the full panel.

17 MR. JACOB: Yes, that is what I was saying.

18 MR. MARSHALL: Whether the motion will be
19 granted, since the full panel won't be there until the
20 15th or the 16th -- the single judge would decide the
21 stay, not merely the appeal. When Mr. Jacob said I
22 would not have enough time to prepare the papers that
23 need to be served, I say I'm willing and I think I would
24 have time. I think I know the case fairly well and
25 that I would have no difficulty in responding to whatever

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2 they file in the Court of Appeals and in whatever
3 appropriate, time is allotted to me by the Court of
4 Appeals.

5 Let me further comment that I had spoken with
6 Mr. Heller who also expressed a question that your Honor
7 raised a moment ago and that was whether this order can
8 be appealed or not. He didn't think it could be and he
9 said that he understood that because he understood the
10 order was not appealable because the SEC indicated they
11 would be filing a mandamus as a means of seeking relief.
12 If the SEC has elected to go to the Court of Appeals and
13 they filed a notice of appeal, it would seem we should not
14 pursue their remedy within that Court.

15 It seems what they are asking your Honor to do
16 flies in the face of what Congress intended and what the
17 very rules of the Court of Appeals provide. Congress
18 stated in Section 552 of the Freedom of Information Act,
19 a(4)(D):

20 "Except as to cases the Court considers of
21 greater importance, proceedings before the District
22 Court as authorized by this subsection and appeals
23 therefrom take precedence on the docket over all
24 cases that shall be assigned for hearing and trial
25 and for argument on as early as practicable date

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2 and expedited in every way."

3 'It would seem to me that Mr. Jacob, although
4 he didn't articulate is asking for a stay until the 15th --

5 MR. JACOB: Asking for a further stay, Judge.

6 MR. MARSHALL: -- further stay, is really
7 contradicted by Subsection (D); which I just read, because
8 to stay everything, even your Honor's consideration of
9 whatever documents they are supposed to deliver to your
10 Honor in camera, is certainly not expediting the matter
11 in every way. It is giving the case no consideration
12 whatsoever for a period of two weeks, and when we consider
13 that the critical date as far as the complaint that we
14 brought in this case is September 8, and when we consider
15 that the Court of Appeals will not sit until the 16th
16 and that there very well will be an appeal by the SEC or
17 by us to the Supreme Court, depending on what the Court
18 of Appeals determines, for your Honor to grant the relief
19 requested by Mr. Jacob today is to effectively throw us
20 out of court as far as the relief that we seek both on the
21 order to show cause and in the complaint.

22 I just don't think that anyone could even
23 pretend that we would get relief before September 8 under
24 those circumstances.

25 In discussing with Mr. Heller this morning

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2 the provisions of Rule 8, he said that there is a
3 provision for a judge and there is a judge assigned today,
4 tomorrow, the next day to hear applications, and while
5 your Honor has been very patient with us, giving us time,
6 I don't think that it is any more of a burden on that
7 judge hearing the case de novo than hearing the case in
8 this court was on you.

9 I don't think that the issues are that com-
10 plicated nor do I think the issues are one of first
11 impression. I haven't seen Mr. Jacob's papers yet,
12 but I really comment. It seems to me that your Honor
13 has followed the statutory and case law on the books.

14 Rule 8 of the Court of Appeals provides, in
15 part:

16 "That the stay must ordinarily be sought in
17 the first instance in the District Court."

18 That has been done. Incidentally, I checked
19 with Mr. Heller and there is a way to have the judge who
20 is assigned to the court in the Court of Appeals to hear
21 and dispose of this before 5 p.m. tomorrow if he is
22 disposed to.

23 It says, "That the motion shall be filed with
24 the Clerk and normally will be considered by a panel or
25 division of the Court, but exceptional cases where such

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2 procedure would be impracticable due to the requirements
3 of time, the application may be made to and considered by
4 a single judge of the court."

5 Assuming there is an appealable order, which
6 I dispute, there is a provision before the SEC to proceed
7 at the Court of Appeals level at this time to seek the
8 relief they want. There is nothing in the rule that
9 indicates that such a procedure is to be frowned upon or
10 that it imposes a burden on the judge assigned to that
11 and I strongly, with all the strength of my being, urge
12 you to deny Mr. Jacob's request at this time. To do so
13 would in effect make a final disposition of this case,
14 making it as a practical matter impossible for us to
15 finally obtain the relief we seek before September 8.

16 If Mr. Jacob's argument is proper and
17 appropriate, I think it should be addressed to a judge at
18 the Court of Appeals level. The question is whether
19 it is persuasive or not.

20 MR. JACOB: The stay here, insofar as our
21 position is concerned, is important to us, as your Honor
22 can understand. We do want to have an opportunity to
23 litigate this issue, as I said to Mr. Marshall the other
24 day. We have been before your Honor several times.
25 We have filed a lot of paper. We are not dealing with

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2 simple issues. No Court has ever ordered an in camera
3 inspection under these circumstances. We felt we could
4 turn over and we would turn over -- we do want to be
5 heard. We want him to have every opportunity to file
6 paper and be heard. The issue on this hearing is
7 really very simple and in light of what Rule 8-A says,
8 of the Federal Rules of Appellate Procedure, should we
9 place this case before that single judge today and put all
10 the parties and that judge in a position of hearing that
11 stay motion which should normally be considered by a
12 panel with adequate record and pleadings -- I submit, your
13 Honor, respectfully, that the 16th is only 11 days from
14 August 5 and that if our position is so totally without
15 merit he can request and obtain from the Court of Appeals
16 an appropriate order at that time and he will not then
17 have deprived himself of the opportunity of putting a
18 pleading today before a single judge in the Court of
19 Appeals or one tomorrow; he will not have deprived us of
20 anything; and he will not have put your Honor in the
21 position of placing this before a single judge after all
22 that has gone in in this court on this short amount of
23 time and we will have complied with the spirit and policy
24 of Rule 8-A and we will not have damaged him, as I see it,
25 your Honor.

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2 The 16th is approximately three and a half
3 weeks from the day he is so vitally interested in and that
4 doesn't involve impracticability involving time. It is
5 not what was contemplated by Rule 8.

6 Any order entered by this Court will make all
7 of those facts clear. There just isn't a panel. There
8 is nothing I can do about that, nothing the Commission
9 can do about that, nothing that your Honor can do about
10 that. There just isn't a panel. These things are
11 normally considered by panels. Important motions,
12 particularly in the context of a case of this kind deserve,
13 and we want that panel. We think we deserve that panel,
14 we think the Court of Appeals deserves the opportunity
15 of pleadings in this case and an adequate record. We
16 just don't think that when there is more than three weeks
17 after the 16th to deal with these issues and the stay
18 that this whole case has got today to be put before a
19 single judge.

20 THE COURT: It is not the whole case being
21 put before a single judge. What is going before the
22 single judge is going to be the issue of a stay.

23 MR. JACOB: That is right.

24 THE COURT: Otherwise the review by the Court
25 of Appeals is going to --

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2 MR. JACOB: The issue of the stay is going to
3 have to encompass some discussion of the merits.

4 THE COURT: It is going to have to encompass
5 some considerable discussion.

6 MR. JACOB: That is what I mean, right, and we
7 have dealt with the merits here, as I have said before,
8 in three different hearings and there has been extensive
9 oral argument and briefs and --

10 MR. MARSHALL: We can now be more concise.

2 11 THE COURT: I think that is true. I think that
12 we have been dealing with it on a developmental basis; as
13 we have had one hearing, why there have been issues that
14 had to be addressed and were addressed in subsequent
15 papers and subsequent hearings. I don't think that it
16 is going to be necessary to review it before the single
17 judge of the Court of Appeals to the extent that it has
18 been reviewed before me simply because we are at a point
19 in time now where what has been developed is developed
20 now.

21 MR. JACOB: That judge comes to this case
22 without any knowledge of the facts of the law and I
23 respectfully submit that as I read Rule 8-A I just don't
24 think that there is a basis for sending this case to a
25 single judge when a panel is going to be there on the

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2 16th that can make an appropriate order.

3 If Mr. Marshall is so thoroughly convinced
4 that we are wrong and he can convince that panel the
5 appropriate order can be made at that time.

6 MR. MARSHALL: May I ask would you consent to
7 delivering the papers to Judge Broderick in camera on my
8 consent that Judge Broderick make no determination as
9 to what to do with those papers so that you are not
10 harmed and --

11 MR. JACOB: How does that help you?

12 MR. MARSHALL: Then in camera inspection will
13 take place. Let's say the Court of Appeals grants or
14 affirms Judge Broderick, for argument's sake, and I
15 suspect that you will then get a stay or try to get a
16 stay from the Supreme Court in order to appeal to the
17 Supreme Court, if you feel that the matter is that
18 important. If the Supreme Court acts expeditiously -- I
19 don't know that the Supreme Court will hear this matter
20 until October. I have never heard of the Supreme Court
21 coming to an extraordinary session --

22 MR. JACOB: I told you on the telephone last
23 night we are not laymen and while I cannot give you any
24 commitment or guarantee, I have spoken before Commissioners
25 you speak about the Supreme Court as if every time the

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2 Commission loses just any application it has entree to
3 the Supreme Court. These are careful steps that have
4 been measured and weighed. The denial of a stay --
5 you are talking in the context of a situation and you
6 ought to evaluate it. I can't say more than I'm
7 saying. Let's be adult and mature about this.

8 MR. MARSHALL: I also feel that you don't
9 have an appealable order.

10 MR. JACOB: We are not here to argue that.

11 MR. MARSHALL: A few days ago Mr. Pitt had
12 asked that action be deferred on this matter until the
13 16th. I don't think it would have made --

14 THE COURT: If the application had been to
15 grant a stay until August 16 I don't believe I would have
16 granted that.

17 MR. JACOB: I was in the courtroom. My recol-
18 lection was that your Honor was entertaining the notion
19 of having Mr. Marshall, if he agreed, because of the
20 exhaustion of remedies problem, go back to the Commission.
21 He is in a much better position going back to the Com-
22 mission, even if he went to the Commission for something
23 under 20 days and would end up back in the District Court,
24 assuming, arguendo, the Commission would deny in all
25 respects his FOIA request. He is now in the Court of

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2 Appeals with that Court on the 16th is going to say yes
3 or no on a stay. He isn't going by indirection to the
4 Commission back to the District Court. He is going
5 right to the Court of Appeals.

6 I would say that inasmuch as your Honor was
7 considering that it might be appropriate to put this into
8 the FOIA channels --

9 THE COURT: I was reaching for a possible
10 accommodation at that point.

11 MR. JACOB: What I am saying is if that appeared
12 to be a possible accommodation, we are up ahead of that.
13 We are in the Court of Appeals making a determination on
14 a stay on the 16th. We are not going back to the
15 Commission. We are not coming back thereafter to the
16 District Court and then start the appellate process.
17 The appellate process, insofar as the stay is concerned,
18 will be over. We are going directly to the Court of
19 Appeals and, really, it has got to be placed in the context
20 of a further stay of 11 days.

21 THE COURT: Let me just explore this with you,
22 Mr. Jacob. The statute and the cases, as I read them,
23 don't place any emphasis on the reasons why people wish
24 to discover documents under the appealable freedom of
25 Information Act and they analogize it to the tests for

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2 discovery in litigation, but they distinguish that test
3 by pointing out that there you do at least look at the
4 need of the person seeking discovery for that discovery
5 whereas in the Freedom of Information cases they don't
6 look at that at all.

7 At the same time it does seem to me i has
8 been made very clear in this case what the need is and
9 there is a timetable related to that need, a timetable
10 having to do with affairs here in New York City and
11 certainly while that is not a criterion set out in any rules
12 of the cases it is not something that we can put blinders
13 on about. And to the extent that there was now a
14 further postponement two weeks, to that extent you are
15 pushing further and further back the area of where -- the
16 time when disclosure will be made, if it is to be made,
17 which is certainly still a very big "if".

18 My problem with your application is that,
19 frankly, I don't see how in a timetable between the 16th
20 or from the 16th on that anything would be forthcoming
21 on a District Court level for at least 10 days or so.
22 Maybe I'm wrong. Maybe it would be quicker than that.
23 But Mr. Marshall has made it quite clear that his interest
24 is in obtaining information so that information can be
25 disseminated to the public in New York before a primary

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2 election.

3 While that is not a criterion that is used in
4 assessing whether the information should be made available
5 or not, it certainly is a criterion that can be looked
6 at to see what the timetable is, because the information
7 is not made available in time so far as the plaintiff in
8 this case is concerned, he is not going to be interested
9 in it any more.

10 MR. JACOB: I think your Honor has assessed it
11 fairly insofar as time is concerned, and that is precisely
12 what I'm saying. Even if it were 10 days and the Court
13 of Appeals -- I must emphasize that -- that the Court of
14 Appeals will be there and be able to make an appropriate
15 order the 26th, which is certainly a late date, or not even
16 until the 30th. What I'm saying is that it could even
17 happen before if it had to happen.

18 We find ourselves in a situation of -- I'm
19 happy your Honor has said it -- being dragged along in a
20 very important case where determinations are being made
21 because of the dates that really have -- looking at the
22 statute, are not the criteria for making these determin-
23 ations. Yet these cases are important to us. The
24 issues are very important to us. We want the oppor-
25 tunity to have them determined as the rules require in

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23

1 normal course. I'm ready to accommodate Mr. Marshall
2 and have them done so that his clients' interests are
3 going to be served if he ultimately prevails, but he should
4 be able to explain, even if we import into all of this
5 the September 8th date, that this is so exceptional a
6 case in light of time requirements that this Commission is
7 not entitled, because of the absence of a panel of the
8 Court, to 11 more days after the 5th so that we can have
9 a panel there to consider a motion that should normally
10 be considered by a panel, that should normally be con-
11 sidered on pleadings, that should normally be considered
12 with an adequate record.
13

14 There are certain things the Commission is
15 entitled to in the interests of the public that it serves
16 and we are not depriving Mr. Marshall of anything. If
17 anything, he is not going to have the time to put in any-
18 thing that can resemble a measured response, and if he
19 is right he will be there on the 16th and there will be a
20 panel in that court and I doubt that they will lack the
21 wisdom to serve the interests he represents if he is
22 right as he says he is.

23 I can only urge the Court that this case is
24 important to us. We would turn these documents over
25 if we felt we could. The Commission has told us no.

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2 It feels very strongly about this. I'm here asking
3 your Honor to make an order which would give a Government
4 agency an agency that serves the public investors, the
5 opportunity to get the hearing it deserves without depriving
6 these interests at all, consistent with the policy and
7 spirit of those rules.

8 We just got to somehow balance that September
9 8th date with some other interests in this case. It just
10 can't drag everything with it, your Honor.

11 I most respectfully urge the Court that he
12 is going to be before the Court of Appeals no later than
13 August 16. Nothing is about to happen tomorrow, and it
14 won't.

15 MR. MARSHALL: Something may happen tomorrow.
16 This judge may deny your request for a stay. You may
17 move to deliver the papers to Judge Broderick.

18 THE COURT: Something else may happen. Some
19 time between now and August 16 the Commission may issue
20 its report and moot the case.

21 MR. JACOB: I said to Mr. Marshall, "We are on
22 the same wavelength, more or less. You want inform-
23 ation, but what you have done here is really disrupted
24 our attempts to get it to you as quickly as possible.
25 We are not dragging it out."

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1 He knows me well enough to understand that
2
3 I would not be associated with any such effort. If I
4 couldn't do what I'm hired to do I wouldn't take the check
5 I get every other week, your Honor. I'm telling Mr.
6 Marshall, as I told him over and over again -- we have made
7 that commitment in court and I know your Honor doesn't
8 doubt it -- that we are here doing everything that is
9 humanly possible today and tonight to serve the interests
10 he is talking about, apart from the public investor
11 interest in this case.

12 This turn-over for inspection is an issue that
13 is of vital concern to the Commission and we come here
14 saying, "Give us the opportunity to get it determined
15 properly. Don't put us before a single judge. That
16 single judge whom we are going to go to today is just
17 going to get this thing anew, just fresh. We'll be before
18 him for the first time. We should follow the normal
19 course. The Court can enter an order that makes eminent
20 good sense that says it is the policy of the rules,
21 the spirit of the rules. It doesn't impede his interest.
22 It gives everybody their due. We have just got to
23 balance it and in the balance of interests in this case
24 it just comes out right if it is done that way, your
25 Honor.

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The other way one's interest in this case is going to be severely sacrificed to issues as your Honor has already said, that aren't even mentioned here.

I have no question that the Court of Appeals has got the wisdom to carry or to implement whatever has to be done to see to it that his interests are served, if indeed he is right, but we should not sit in haste, I suppose, because we have no leisure time to repent, but I only urge the Court we can enter an order here which would make good sense. It is only 11 days and three judges on a panel up there will have it all.

THE COURT: Let me ask you this, Mr. Jacob:

Wouldn't it make sense for you to submit the documents and for the stay to be of any further proceedings pending August 16? What that would do would be to give me an opportunity to make my evaluation and come out with it very promptly.

Well, there are two possibilities. One possibility is that I will decide that the Commission's arguments under Subdivision 5 or Subdivision 7 or both is a binding argument which forecloses disclosure.

The other possibility would be that I would find that it should be disclosed.

It would seem to me that if I came to a

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2 conclusion as to No. 1 prior to August 16, we could
3 have another conference and I could inform you of that
4 and I might at that time issue an opinion to that
5 effect.

6 Conversely, if I don't reach that or if I have
7 not had that opportunity between now and the 16th to
8 arrive at any conclusion, certainly there would be no
9 order issuing that would direct release until the Court
10 of Appeals had an opportunity to consider it and if the
11 Court of Appeals finds that my prior order was wrong, they
12 can issue that decision.

13 MR. JACOB: Your Honor, if we thought that we
14 could turn over --

15 THE COURT: I think, as you know, I really do
16 not have any curiosity as to what is said in those
17 papers.

18 MR. JACOB: If you knew what was in them I'm
19 sure you would reaffirm that.

20 If we felt that we could bring those papers in
21 here and do that we would do it. What we are here on
22 this case about is that we are saying that we just can't
23 do that, Judge, and we want that reviewed. We want that
24 heard.

25 Your Honor has obviously come to the determin-

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2 ation that it just isn't so and you don't agree with us.

3 THE COURT: No.

4 MR. JACOB: We were talking about an in camera
5 inspection.

6 THE COURT: All right.

7 I do think -- when you said that I have come
8 to the conclusion, what you say is not so. I have not come
9 to any such conclusion.

10 MR. JACOB: I mean in camera inspection.

11 THE COURT: My conclusion is that I should make
12 an independent determination, yes.

13 MR. JACOB: That goes again to the merits.
14 I'm not here to argue the merits.

15 THE COURT: I understand that.

16 MR. JACOB: I'm tempted to, but I won't.

17 I'm here on a very narrow question urging the Court, as
18 respectfully as I can, that we have got various interests
19 here and I just think what I submitted to your Honor is
20 sound, it is reasonable and it serves all interests.

21 We understand your Honor has ordered the in
22 camera inspection. We are merely asking for a very short
23 period of time because of things beyond our control to
24 get these issues here resolved. We have no control
25 over the panel in the Court of Appeals. It would just

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2 be different if we were here in January or February.

3 I come back to that, because there is no problem --

4 MR. MARSHALL: But there is, Judge. Mr. Jacob
5 is not asking for a short period of time. He is asking
6 for half the time that is left to us. He told me that
7 under Rule 8-A you really don't belong in the Court of
8 Appeals.

9 MR. JACOB: He might have made notes but --

10 MR. MARSHALL: I understand that you don't
11 feel that you should go to the Court of Appeals under this
12 last sentence of 8-A of going to a single judge in
13 exceptional cases.

14 MR. JACOB: We have come back to the District.

15 MR. MARSHALL: If you don't feel you come under
16 that, then you shouldn't be asking Judge Broderick to give
17 you an additional stay.

18 MR. JACOB: We have to come back to the
19 District Court and make an effort to get the stay here.
20 The reason we have to do that is because obviously a
21 judge unfamiliar with these things ought not to be con-
22 fronted with it on no notice at all or on very short
23 notice, so we are here doing that and if we are denied
24 there is, of course, a basis to go to the single judge.

25 MR. MARSHALL: I would like to state for the

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2 record that I would agree to the proposal that Judge
3 Broderick mentioned as to an in camera examination and
4 staying as to submitting the papers in camera and staying
5 further proceedings Until the Court of Appeals decides it,
6 if they would consider it, with the sole exception that
7 Judge Broderick might call us back as he mentioned if he
8 decides not to make a determination on the documents.

9 MR. JACOB: Any order entered by the Court
10 would recite that the Court has been advised that there
11 is no panel up there. The Court has been advised that
12 the next motion day is the 16. The issues here are
13 entitled to in the normal course appellate review. It is,
14 further, the first time a Court has done this. We are
15 trying to get the matter reviewed. It isn't as if the
16 Court of Appeals is sitting on September 6. It is
17 sitting on August 16 and any order that is entered by
18 this Court will reflect that all of the interests have
19 been weighed very carefully and the fact that the Court
20 of Appeals will be there on the 16th and if Mr. Marshall
21 can persuade them it can make an order, an appropriate
22 order, to see to it that whatever needs to be done is done
23 insofar as counsel is concerned, particularly.

24 MR. MARSHALL: I have no guarantee, no assur-
25 ance, really, not much hope that the Court of Appeals could

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2 or would do anything or that Judge Broderick has the
3 physical ability, meaning no disrespect, of accomplishing
4 starting August 16 what he can start to accomplish by
5 5 p.m. tomorrow.

6 THE COURT: Let me just amend that suggestion.
7 I have to take away the possibility that I would come
8 down with anything prior to August 16 either towards not
9 releasing the documents or otherwise, because it seems to
10 me that you want to maintain the integrity of your appeal
11 and there is a possibility that that might moot the appeal
12 and what you want to test on the appeal is my interpreta-
13 tion, among other things.

14 I think you really have two things you want
15 to test on the appeal. I think you want to test the
16 question of the exhaustion of remedies and you also want
17 to test the question of my right to power as a District
18 Judge to have in camera inspection under the circum-
19 stances of this case.

20 If I decided after an in camera inspection
21 that these documents should not be released and dismiss the
22 complaint, that might very well moot your appeal.

23 Let me amend your original suggestion that
24 there be an in camera submission to me and that I will do
25 nothing; in effect, everything will be stayed until

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2 August 16 and then, of course, if the Court of Appeals
3 decides the case or grants a further stay, of course that
4 will continue.

5 It seems to me that this would not adversely
6 affect any interest of the Commission.

7 MR. JACOB: It would, your Honor.

8 THE COURT: How?

9 MR. JACOB: It would because we are contesting
10 the propriety of ordering the Commission, ordering --

11 THE COURT: That would be a question which is
12 precisely before the Court and the Court would decide
13 and what would be stayed is any activity on my part at --
14 all acting upon that until the Court of Appeals --

15 MR. JACOB: We have already submitted it.

16 THE COURT: Then you have challenged my right
17 to call or to direct you to submit.

18 MR. JACOB: Right.

19 THE COURT: This could be handled by a stipula-
20 tion between the parties that it is without prejudice to
21 your maintaining in the Court of Appeals that I have no
22 power to require the submission.

23 MR. JACOB: That is true, but the point is
24 we have already turned over -- what we are trying to do,
25 your Honor, is preserve the integrity of the entire case

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2 and we are asking an opportunity or for the opportunity
3 to do that. We have a highly active investigation
4 right in its midst. We have got multiple drafts of
5 documents prepared by junior lawyers and other staff
6 members. Frankly, I have never envisioned when dealing
7 with the FOIA that a Court in the middle of that kind of
8 an investigation asked us to turn over draft upon draft
9 upon draft for its review of a good deal of these drafts,
10 though oftentimes on other cases.

11 For example, people submit drafts to me, as
12 I'm sure it is an outside law practice. They need
13 substantial revision. They are not retained in the
14 files thereafter because the files would be so cluttered
15 up you wouldn't have any room for them. This is stuff
16 that comes in to a branch chief or an assistant administrator
17 or associate administrator or an administrator. This is
18 draft materials and we are in the middle of this ongoing
19 investigation and it is highly active. We are working
20 round the clock and then a party makes an application in
21 court unconnected with the other and the fact that he is
22 a citizen of the City of New York, and the next thing
23 I know every draft in my office is being carried across
24 the street to the Southern District of New York.

25 I don't want to mention other cases, but if

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2 that is the law, then we might as well -- I don't know
3 how we are going to conduct investigations at all.

4 I don't want to make an in terrorem argument. I know
5 your Honor's feelings about that. I only make that

6 argument because I don't want to get into the merits.

7 I just want to give you the feeling of a lawyer who has
8 been around the Commission for some years now and has never
9 seen it. I never envisioned the FOIA could operate

10 that way. If it is going to operate that way, let the

11 Court of Appeals say so, but I just don't think the

12 Commission ought to come over with those drafts.

13 The Commission is here under 21-A, among other
14 things, determining whether it wishes to issue a report
15 here. It is going to determine it when it gets a final

16 product from the staff. What this portends, I suppose,

17 is that the Court might determine whether the Commission

18 is going to issue a report here and it might be a draft

19 report, because if your Honor ultimately determines that

20 something ought to be released, you've released it, not

21 the Commission under 21-A, and not final reports, but you

22 have released some draft. This is something that wasn't

23 even mentioned in argument.

24 I can only say after looking at this that it
25 just isn't right and we are going to test it. We are

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2 not going to turn over things. We are not going to
3 bring over drafts to the Court House unless the Court of
4 Appeals tells us to do it. To turn it over now, whether
5 your Honor is going to do something on the 16th or not
6 till the 16th is irrelevant.

3 7 What I am saying is, your Honor, the mere
8 fact that you have ordered in camera production here is
9 something of vital concern to us. If you are asking
10 us to make the in camera production we might as well not
11 challenge the issue that we are going to make, but we
12 are disput the propriety of that order. We are asking
13 your Honor to balance the interests of the Government
14 agency in here that it has shown every indication insofar
15 as it is possible that is moving ahead on this matter
16 as expeditiously as is humanly possible; that there are
17 weeks that go on after the 16th. There is a panel of
18 the Court that just isn't available and it is not of our
19 making. We ask your Honor to enter an order that simply
20 balances those interests, does not prejudice those other
21 interests, and the plaintiffs' interests in this case.
22 I think we deserve it. It is a case really of first
23 impression.

24 I say, and I have been with the Commission a
25 long time, that I have never had a judge order us to do

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2 this kind of thing. We want to get an appropriate
3 panel review. A motion for a stay is entitled to a
4 panel. There are no exceptional circumstances here in
5 light of all of the facts that should compel us to go
6 before a single judge and it isn't really appropriate
7 to come before your Honor and ask your Honor to place this
8 before a single judge today. It should go to a panel.
9 I don't think a single judge sits there to do that.
10 There are more than three weeks after the 16th and we can
11 enter an order that is going to be eminently sound in terms
12 of balancing these interests. It is 11 days and, as
13 I said before, your Honor, you expressed thought at the
14 last hearing if Mr. Marshall would agree, to go back to
15 the Commission, and we are way ahead of that. We are up
16 in the Court of Appeals at the latest on the 16th.

17 MR. MARSHALL: I think that is quite unfair.
18 I'm not in a position of being able to make that comparison
19 about how ahead I am. I'm really nowhere. I've got
20 an interim order for an in camera inspection. We're
21 going to have that tested at the Court of Appeals.

22 THE COURT: Mr. Jacob's remark that you are
23 well ahead of the game was an unspoken presumption on his
24 part that the Commission, after due consideration, would
25 deny the request.

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2 MR. JACOB: That is one thing I have always
3 been careful about in the record in any case. I am often
4 asked questions along the lines:

5 What would the Commission do if -- and because
6 of my experience with the Commission I know full well
7 they are not the staff's rubber stamps. You can find
8 Commissioners up there who are thoroughly expert in the
9 securities laws and in the issues we deal with and if
10 anything they think independently and it is almost like
11 going before a Court: sometimes you lose easy ones and
12 sometimes you win hard ones. For any one on the staff
13 of the Commission ever to suggest that they can go before
14 the Commission and get authority to do one thing or
15 another because they are going to recommend it is not
16 only arrogant but it is inaccurate and untrue. It just
17 doesn't ever happen. It just isn't right, and I
18 would never say that and to the extent that my statement
19 even implied it I categorically withdraw any such
20 implication at this juncture.

21 MR. MARSHALL: A keen observer of the Com-
22 mission with respect to what decisions they have been
23 making with respect to freedom of information requests
24 is connected with the investigation in the City of New
25 York. One only has to go to the request of the New York

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2 State Assembly's Committee on Banking and our guess that
3 they would act negatively would be fairly accurate.

4 I would like to say, your Honor, that I am
5 totally opposed to any ruling by this Court -- merely an
6 attorney advocating my client's position -- which would
7 slow down the process and expeditious manner of handling,
8 the time prescribed in Section 552.

9 To grant a stay for 11 days would just really
10 put the brakes on every procedure that could happen and
11 should happen in this case.

12 I had learned a few weeks ago with Arthur
13 Sulzberger, the publisher of the Times, Max Frankel,
14 Clifton Daniel and other people in editorial and they said
15 they thought it would be a good case but I'm going to be
16 appealed to death before I get a conclusion. That is
17 I think the direction that Mr. Jacob seeks to go.

18 There are rules that provide for review by the
19 Court of Appeals for the granting of a stay, even if Mr.
20 Jacob is persuasive. I think that the suggestion your
21 Honor made with respect to compromising our interests by
22 receiving the papers in camera and holding off any deter-
23 mination one way or another until the Court of Appeals
24 has spoken is a Solomon-like approach and I would go along
25 with it, even as amended by your Honor.

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2 Mr. Jacob can't or won't or was unable to go
3 along with it. I think we should proceed directly to
4 the Court of Appeals and get on with it.

5 THE COURT: Do you think there is any point in
6 your submitting that suggestion, Mr. Jacob, to Washington,
7 or do you feel confident that the position you have taken
8 is the position that it would take?

9 MR. JACOB: Your Honor --

10 THE COURT: I realize this is not a question
11 for the Commission, but a question for the general counsel's
12 office.

13 MR. JACOB: I can get back to your Honor
14 quickly. I just don't think --

15 THE COURT: If you as the attorney here repre-
16 senting the Commission feel that your answer is the
17 definitive answer, that is fine with me.

18 MR. JACOB: I say, your Honor, I can just
19 convey the suggestion. I don't think it is going to
20 waste anybody's time if I make the effort.

21 THE COURT: You can use the phone in the
22 office.

23 MR. JACOB: Yes. I do think, your Honor,
24 however, that where a litigant in this case such as one is
25 confronted with with matters or events that do not bring

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2 about -- it is not our doing that there is no panel up
3 there and there is time. I could only urge your Honor
4 that we should not be forced before a single judge this
5 afternoon. I have said it before and I say it to
6 Mr. Marshall again, that it doesn't serve his interests --
7 it just doesn't serve his interests -- to serve the papers
8 today and be before a single judge today without any
9 pleadings is a disservice to the judge, is a disservice to
10 the parties and is a disservice to the important issues
11 of this case, and without sacrificing any of the interests
12 he represents we can do this in a --

13 MR. MARSHALL: You are asking me to turn my
14 back on the issue.

15 MR. JACOB: We can do this in the normal,
16 ordinary way and the time requirements are just not
17 impracticable in this matter to compel us to go before a
18 single judge in a case of this kind. We are not asking
19 for a 30-day stay or for a 60-day stay. We are asking
20 for the opportunity to go before a panel of the Court of
21 Appeals and request a stay similar to the kind we have
22 asked this Court at the very first opportunity that that
23 panel is there. That is all we are asking.

24 It is an important case with important issues
25 and the panel will be there. There is no problem. We

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2 would like to ask that panel for the stay we have asked
3 your Honor for and the panel will be there on the 16th,
4 11 days from the expiration of the stay your Honor has
5 heretofore entered. There is no great amount of time
6 involved and the case deserves and the parties deserve and
7 the Court deserves that. I suggest we can enter an
8 order reflecting all of these things. There is nothing
9 unreasonable about it.

10 MR. MARSHALL: I would like to comment that
11 since Mr. Jacob now said in argument that he doesn't think
12 that going to a single judge comes within the last sentence
13 of Rule 8-A, that this is not an exceptional case where
14 a procedure would not be practicable to do to requirements
15 of time, that therefore you have no basis of going to that
16 judge, I think --

17 THE COURT: No, I think his argument is
18 entirely different as I have heard it anyway. It has
19 been that the judge just won't be fully informed.

20 MR. MARSHALL: I find that difficult to under-
21 stand, your Honor, because they have been very able to
22 inform your Honor as to their position. And he talks in
23 terms of a disservice to me. I'll be prepared in whatever
24 time I have. If I have to put on extra people and staff,
25 I will do it. I'm not asking for any adjournment.

1 MCS

2 What he is asking, your Honor, is for your
3 Honor to throw my case out of court.

4 THE COURT: No, I don't think he is asking for
5 that. I think he hopes that on August 16 they will be
6 able to do that.

7 MR. MARSHALL: We have to be mindful of the
8 time, your Honor, and for this case to come to a screeching
9 halt between now and the 16th is to do the plaintiffs a
10 disservice, the people of the City of New York a dis-
11 service.

12 THE COURT: One way or another it would come
13 to a screeching halt knowing that this is going to be
14 presented to the Court of Appeals on August 16 under any
15 circumstances. I don't believe that I would rush out an
16 Opinion prior to that realizing that the SEC in good faith
17 has challenged my power to issue the order I have issued.
18 I would at least wait and see if the Court of Appeals
19 ordered a stay.

20 MR. MARSHALL: I understand that. I'm
21 cognizant of that and I realize that your Honor would be
22 doing that. By their filing the notice of appeal from
23 what I believe to be a non-appealable order they are going
24 to gain another delay until the 16th before your Honor
25 decides the issue. I feel that the Court of Appeals is

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2 going to dismiss their appeal as being premature.
3 What is happening by the filing of the notice of appeal
4 that they are getting a stay of 11 days. I feel by
5 filing a notice of appeal with the Court of Appeals now
6 gives jurisdiction to the Court of Appeals and having
7 elected that remedy they should now follow the rules of
8 the Court of Appeals and seek a stay pursuant to those
9 rules.

10 MR. JACOB: What runs through a lot of this
11 argument -- I know it is inadvertent on the part of Mr.
12 Marshall is the Commission's seeking a delay, because it
13 doesn't want to do one thing or another.

14 THE COURT: Mr. Marshall, I can listen to both
15 of you and I won't understand either of you. The reporter
16 can't do that.

17 MR. MARSHALL: May I just make this one comment,
18 your Honor:

19 I am disturbed about the fact that when we
20 started the lawsuit we were told that there were 100,000
21 pages of uncollated data. The more sessions we have
22 the more we realize that there is much more than 100,000
23 pages of uncollated data. Only this morning Mr. Jacob
24 told that drafts of reports not in file form, which drafts
25 were not even hinted at during the first arguments.

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2 I'm not casting any aspersions on anybody. I have a
3 world of respect for Mr. Jacob, more than any other
4 Government lawyer, but I am disturbed as to how the facts
5 have come out piecemeal and therefore I shudder at the
6 thought of any halt in the expeditious handling of this
7 case, as Congress has explicitly prescribed it.

8 Having filed a notice of appeal now by their
9 choice and their election they have the function of persuad-
10 ing a panel or a judge at the Court of Appeals and whatever
11 the Court of Appeals does they prescribed the procedure.
12 Let Mr. Jacobs go through that procedure. For you to
13 give another stay for 12 days seems to me to be extra-
14 ordinary.

15 THE COURT: I'm not sure it would be extra-
16 ordinary, Mr. Marshall.

17 Mr. Jacob, I have not made any decision on
18 this. I'm not suggesting this in those terms at all, but
19 it might be a good idea if you would check with Washington.

20 MR. JACOB: I would check only because I think
21 in these kinds of matters it is good not to have to leave
22 any stone unturned. I have formed an impression about
23 that. I don't think it takes that much time and I will
24 make the call promptly.

25 THE COURT: Why don't we recess for five

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2 minutes.

3 (Recess.)

4 MR. JACOB: The answer, after my discussion,
5 is, as I stated before, your Honor, I think there are all
6 kinds of problems with that. If we go for mandamus, for
7 example, we do have to be careful so as not to move that
8 and for all of the other reasons I have stated to your
9 Honor I do wish to say that we had hoped that it would
10 not -- we had hoped that it did not come to this point,
11 but the Commission does respect the orders of this Court
12 and we do wish to abide by them. We do, however, wish
13 to have an opportunity to get a review as to all of the
14 questions that have heretofore been presented to the
15 Court.

16 For all the reasons I have already stated,
17 your Honor, I just think that we can enter an order
18 reflecting all of these considerations, all of them, and
19 the matter would be before the Court of Appeals on the
20 16th and those three judges -- as I have said before, we
21 are dealing with 11 days -- those three judges at that
22 time can make an appropriate order which would see to it
23 that if Mr. Marshall is right that he gets his due.
24 There is no doubt in my mind about that.

25 THE COURT: Let me ask these questions of you

1 mcs

2 gentlemen:

3 Can a single judge of the Court of Appeals make
4 a decision on whether an order is appealable or not?
5 That is I think less important than the second question:

6 Can the single judge do anything to expedite
7 consideration of the appeal?

8 As I understand it, there is only a single
9 judge available now and there will only be a single judge
10 available until the 15th. Can that single judge schedule
11 his case for immediate consideration by appeal to the
12 Court of Appeals?

13 MR. JACOB: I don't know the answer to that,
14 your Honor. I just don't know the answer.

15 MR. MARSHALL: We could call Mr. Heller.

16 MR. JACOB: I don't know the answer to that.
17 I suppose it is possible to get on on the 15th as opposed
18 to the 16th, although it is not a motion day, but the
19 answer to that is that I don't know.

20 MR. MARSHALL: Mr. Heller did tell me this
21 morning -- this may be partly helpful -- I think he told
22 me that the calendar for the panel that will sit the 15th
23 or 16th has already been made and for this case to get on
24 that calendar a motion would have to be made. Whether
25 that motion would be decided by the single judge or would

1 mcs

2 be returnable for that day I don't know.

3 THE COURT: That is what I really had in mind,
4 that it does seem to me that a single judge can do a great
5 deal to expedite consideration of this matter by the Court
6 of Appeals.

7 MR. JACOB: We can request that of the Clerk.
8 or find out if it is doable. I just don't know.

9 I know that we have taken all the steps we can take to
10 assure that it is on when the panel is there. In other
11 words, we have been working around the clock to be in a
12 position to file and serve papers so as to be on when the
13 panel says.

14 THE COURT: Gentlemen, I shall grant the stay
15 until the 16th. I do it for a number of reasons.

16 The Commission has urged the order that has
17 already been issued in this case and I understand that
18 that does have ramifications which undoubtedly may go
19 far beyond this case.

20 I also am doing it because I am persuaded not
21 only by what Mr. Jacob has said today but what Mr. Sporkin
22 said at a previous occasion, that the Commission is working
23 as diligently as possible in bringing its report to a
24 stage where, to the extent that it can be made public, it
25 will be made public.

MCS

And so I will grant the stay that has been requested this morning. I do request that counsel for the plaintiffs and for the Commission attempt to arrange a conference as early as possible with the single judge of the Court of Appeals who is available and to do everything that they can to expedite consideration of this matter by the Court of Appeals.

I think that it is possible to lay out enough of the problem and the urgency and the considerations involved in this matter without having a full scale argument before him and I think it is necessary to lay that groundwork now, and it is my understanding that the Commission is as desirous of having immediate consideration of this matter before the Court of Appeals as the plaintiffs will be.

Mr. Jacob, will you undertake to submit an order?

MR. JACOB: Yes, sir.

THE COURT: And will you review it with Mr. Marshall?

MR. MARSHALL: Yes, sir, your Honor.

May I seek a clarification? Needless to say, I'm terribly upset with your ruling because I think it in effect disposes of this case adversely to the interests of

1 MCS

2 the plaintiffs. There is no way that I see that this
3 matter can be resolved before September 8 under any
4 circumstances, having filed a notice of appeal with the
5 Court of Appeals, having procedures which they can follow.

6 I'm terribly upset. I must say I have heard
7 an awful lot about the SEC as to various rulings where
8 they ask the indulgence of the Court and repeat and
9 regurgitate everything after everything has been adequately
10 said.

11 I see your ruling as the death of the case
12 and that the prediction of the New York Times editorial
13 people is coming to task. Your Honor has ruled on what
14 should have been delivered to you by 5 o'clock in camera
15 twice and Mr. Pitt mentioned that if they delivered it to
16 you they might even send people on the staff to help you
17 and guide you, and assuming that the Court of Appeals
18 acts expeditiously on the 16th of August, I think that
19 if it doesn't make it impossible for us to achieve what
20 we seek in the case, it is certainly lengthening the odds
21 an insurmountable amount.

22 I'm not going to come back here to ask for a
23 rehearing the way the SEC has done, but with all the vigor
24 I have, your Honor, I urge you to reconsider your decision
25 that you just made and to recall it and let the Court of

1 mcs
2 Appeals decide what your Honor has made a ruling on.
3 You made a ruling that they should be delivered in camera
4 last Tuesday at 5 o'clock. You have given me a stay
5 until this Friday at 5.00. I mean, that is a lot of
6 bites at the apple that they have had in this court and
7 you have given, I believe, your best decision with respect
8 to the determination you made in a non-final way, at least
9 to the extent of carrying out the mandate to take a look
10 at these papers in camera and to determine for yourself,
11 but by your giving a stay until the 16th, your Honor, you
12 are modifying the order a second time without ever giving
13 the judge or the panel of the Court of Appeals whose
14 jurisdiction they have invoked by serving and filing
15 yesterday a notice of appeal to determine what should be.

16 With your Honor granting a stay until the 16th
17 you are taking away any sense of urgency that we might
18 present to the Court of Appeals for them to expedite this
19 matter. With your Honor granting the stay until the
20 16th there is no urgency for the Court of Appeals to
21 act or to expedite, and I think that the rug has been
22 pulled out from under us. I'm terribly, terribly
23 depressed. I do urge your Honor to reconsider. Let
24 them go through the channels that they have chosen.
25 I think the offer that you made to them was reasonable.

1 MCS

2 For whatever reasons they have, they can't do it.

3 I respect them. It is my Government agency as well as
4 anyone else's. I think they are doing the plaintiff
5 a disservice, however. The granting of an extension
6 to the 16th is extraordinary relief. It should be for
7 the Court of Appeals, more expert as to whether an appeal
8 lies, perhaps that this Court should be.

9 THE COURT: I'm not finding that an appeal
10 lies. It is my judgment that an appeal does not lie,
11 but that is not my judgment to make. And so I am not
12 making any finding or any recommendation that an appeal
13 lies. I am predicating this order on the entire dis-
14 cussion this morning, on the representations that have
15 been made to me by the Commission and on a balancing of
16 considerations. I think that one predicate of the
17 order is the representation of the Commission that it will
18 do everything it can to expedite consideration of the Court
19 of Appeals.

20 MR. MARSHALL: Chairman Williams in a letter
21 to Senator Proxmire made a representation that it could
22 be released to the public by the end of the summer. We
23 don't see that happening.

24 I ask your Honor to grant a stay pending
25 appeal. You have already granted a stay until Friday.

1 mcs

2 I think it is the province of the judge of the Court of
3 Appeals to determine whether a stay should be granted
4 and coordinate that with expedition. I think you are
5 reaching now the province of the Court of Appeals.

6 THE COURT: The rules require the application
7 to be made to this Court.

8 MR. MARSHALL: If it is done in the first
9 instance.

10 THE COURT: It can be made to the Court of
11 Appeals after it has been made here. I think the
12 procedure followed is proper.

13 MR. MARSHALL: The rule says a stay must be --
14 this is 8-A -- sought in the first instance in the
15 District Court. That was granted to them on Tuesday
16 when they did get the stay. That is in the first
17 instance. The rule doesn't talk about the second
18 instance. Having gotten the stay from the District
19 Court in the first instance they are obliged to go up-
20 stairs.

21 MR. JACOB: Your Honor, are there any specific
22 provisions your Honor has in mind to put in the order?
23 I have no problem in making every effort we can to expedite
24 consideration of the Court of Appeals. We will do that
25 promptly.

1 mcs

2 Is there anything else?

3 THE COURT: No. I want to make it very clear
4 here, and I think I have already said this, that granting
5 this stay does not indicate that I don't think that this
6 matter is an urgent matter and it must be given very early
7 consideration.

8 MR. JACOB: By all of the parties.

9 Thank you, your Honor.

10 THE COURT: Thank you, gentlemen.

11 MR. JACOB: I take it your Honor will be in
12 chambers for the remainder of the afternoon so that we will
13 be able to bring the order up.

14 THE COURT: Yes.

15 MR. JACOB: Thank you, your Honor.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
JOEL HARNETT, et al.,
:
Plaintiffs,
:
v.
:
77 Civ. 3110 (VLB)
SECURITIES AND EXCHANGE COMMISSION,
:
et al.,
:
Defendants.
:
-----X

ORDER

The Court having entered an Order on August 2, 1977, inter alia staying until 5:00 p.m., August 5, 1977, this Court's Order of August 1, 1977 requiring the in camera production of certain materials of the New York Regional Office of the Securities and Exchange Commission, upon condition that the defendant Securities and Exchange Commission promptly: (1) file such pleadings as are necessary to perfect appellate jurisdiction of this Court's Orders not later than August 3, 1977, and (2) seek from the Court of Appeals for the Second Circuit a stay of this Court's Order to produce materials no later than August 5, 1977; and the Commission having filed a Notice of Appeal on August 3, 1977 from this Court's Orders of August 1 and August 2, 1977; and the defendant Commission having applied for a further stay of the Orders of this Court until 5:00 p.m., August 16, 1977, having advised the Court that no panel of the Court of Appeals will be available until August 15, 1977 and that the next

scheduled motion day pursuant to Section 27(b) of the Rules of the United States Court of Appeals for the Second Circuit is August 16, 1977; and the Court having this day held a hearing thereon and having directed the defendant Commission promptly to take steps to determine whether consideration of this matter by a panel of the Court of Appeals for the Second Circuit before August 16, 1977 is feasible;

IT IS HEREBY ORDERED that the Orders of this Court, requiring the production of certain materials for in camera inspection be, and they hereby are, stayed until 5:00 p.m., August 16, 1977.

151 V. L. BRODERICK
VINCENT L. BRODERICK
UNITED STATES DISTRICT JUDGE

Dated: August 4, 1977
New York, New York

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AUG 6 8 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OFFICE OF GENERAL COUNSEL

----- X
JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs,

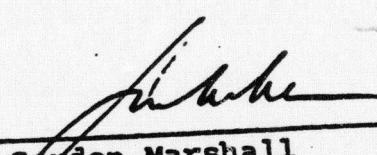
77 Civ 3110 (VLB)

-against-

NOTICE OF APPEAL

SECURITIES AND EXCHANGE COMMISSION
and EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,Defendants.
----- X

Notice is hereby given that the plaintiffs, JOEL HARNETT, SAVE OUR CITY, INC. and GORDON MARSHALL, hereby appeal to the United States Court of Appeals for the Second Circuit from the order of Hon. Vincent L. Broderick entered on August 4, 1977 extending a stay of his orders of August 1 and August 2, 1977 to August 16, 1977 at 5 P.M.


Gordon Marshall
Attorney for Plaintiffs
60 East 42nd Street
New York, New York 10017
(212) 661-1640

Dated: August 4, 1977

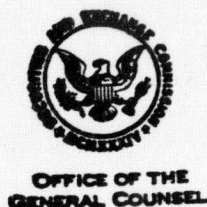
TO:

Clerk of the Court
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

Robert Fiske, United States Attorney
Southern District of New York
1 St. Andrew's Plaza
New York, New York 10007
Attention: Michael Dolinger
Asst. U. S. Attorney

Marvin E. Jacobs
Associate Regional Administrator
New York Regional Office
Securities and Exchange Commission
26 Federal Plaza
New York, New York 10007

Harvey L. Pitt, Esq.
General Counsel
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549



SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

August 5, 1977

BY HAND

A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
New York, New York 10007

Re: Harnett, et al. v. Securities and Exchange Commission,
et al., C.A. 2, No. ____.

Dear Mr. Fusaro:

Enclosed for filing with this Court are an original and three copies of the motion of the Securities and Exchange Commission, appellant in the above-captioned appeal, requesting a stay, pending the disposition of this appeal, of one of the orders appealed from, which directs that the Commission submit certain law enforcement investigatory records and predecisional staff memoranda to the district court for its in camera inspection. Also enclosed are an original and three copies of the completed notice of motion form to be submitted with the motion. The Commission filed its notice of appeal on August 2, 1977. It intends shortly to file a petition for writs of mandamus and prohibition, out of an excess of caution, to assure the jurisdiction of this Court.

The district court had stayed until August 5, 1977, its order directing in camera production. On August 3, 1977, Mr. Heller of your Office advised Commission counsel that this Court was not in regular session, that a panel of the Court would not be available until August 15, 1977, and that the next scheduled motion day was August 16, 1977. Mr. Heller suggested that the Commission apprise the district court of this situation and request a further stay from that court. Mr. Heller emphasized that the question of whether to issue a further stay was solely in the discretion of the district court.

- 2 -

Accordingly, on August 4, 1977, the Commission applied to the district court for a further stay, and on that date the court extended the stay of its order directing in camera inspection until August 16, 1977, at 5:00 p.m. At a hearing to consider the Commission's request for an extension of the district court's original order, the court directed the Commission promptly to inquire of the judges of this Court who may now be available whether it would be feasible to consider the Commission's stay motion by a panel of this Court before August 16, 1977. Accordingly, the Commission respectfully requests such advice, so that it may, in turn, inform the district court and opposing counsel whether it is feasible for a panel of this Court to consider the Commission's stay motion prior to August 16, 1977.

Sincerely,

Harvey L. Pitt
Harvey L. Pitt
General Counsel

Enclosures

Copies to:

Honorable Vincent L. Broderick
United States District Judge

Gordon Marshall, Esquire



OFFICE OF THE
GENERAL COUNSEL

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

August 5, 1977

The Honorable Vincent L. Broderick
Judge, United States District Court
for the Southern District of New York
United States Courthouse
Foley Square
New York, N. Y. 10007

Re: Harnett, et al. v. Securities and Exchange Commission,
et al., S.D.N.Y. 77 Civ. 3100 (VLB)

Dear Judge Broderick:

Enclosed is a copy of the Commission's motion filed with the Clerk for the Court of Appeals for the Second Circuit today, seeking a stay of Your Honor's order which directed the Commission to submit certain documents for in camera inspection. Also enclosed is a copy of the appendix to that motion and to a petition for writs of mandamus and prohibition which the Commission intends to file shortly with the Court of Appeals. Finally, I am enclosing a copy of my letter to the Clerk of the Court of Appeals, dated today, submitting the motion papers. In that letter, in accordance with Your Honor's direction to the Commission, we are inquiring whether it is feasible for a panel of the Court of Appeals to consider the Commission's stay motion prior to the current return date of August 16, 1977.

Respectfully yours,

Harvey L. Pitt
Harvey L. Pitt
General Counsel

Enclosures

Copy to: Gordon Marshall, Esquire



OFFICE OF THE
GENERAL COUNSEL

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

August 9, 1977

The Honorable Vincent L. Broderick
Judge, United States District Court
for the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Harnett, et al. v. Securities and Exchange
Commission, et al., S.D.N.Y., 77 Civ. 3100 (VLB)

Dear Judge Broderick:

On August 5, 1977, I advised you that I was inquiring of the Clerk of the Court of Appeals for the Second Circuit whether it was feasible for a panel of that Court to consider the Commission's motion for a stay of Your Honor's order directing in camera inspection prior to the current return date of August 16, 1977.

Mr. Heller, of the Court of Appeals' Clerk's Office, has advised me this morning that he regretted that there was no possible way for a panel of the Court of Appeals to consider the stay motion prior to August 16. Mr. Heller informed me that he intended to contact Mr. Marshall and your chambers directly to convey this information.

Respectfully yours,

Harvey L. Pitt
Harvey L. Pitt
General Counsel

cc: Gordon Marshall, Esquire